STATE OF MICHIGAN
IN THE SUPREME COURT

LAURENCE G. WOLF,
As an individual and as proposed class representative, d/b/a
LAURENCE WOLF PROPERTIES

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.
_____/

Supreme Court No. 140679
Court of Appeals No. 279853

Brief of Amici Curiae
The Michigan Municipal League
Michigan Townships Association

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the brief of the Defendant-Appellee City of Detroit is correct and is adopted by the amicus curiae.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding that the City of Detroit's refuse collection inspection fee was implemented for a regulatory, not a revenue raising purpose?

Plaintiff-Appellant says	"Yes"
Defendant-Appellee says	"No"
Amici Curiae say	"No"

II. Did the Court of Appeals err in finding that the City of Detroit's refuse collection inspection fee was proportional to the cost of providing the service for which it was imposed?

Plaintiff-Appellant says	"Yes"
Defendant-Appellee says	"No"
Amici Curiae say	"No"

III. Did the Court of Appeals err in finding that the City of Detroit's refuse collection inspection fee was voluntary?

Plaintiff-Appellant says	"Yes"
Defendant-Appellee says	"No"
Amici Curiae say	"No"

STATEMENT OF FACTS

The amici curiae Michigan Municipal League Legal Defense Fund and the Michigan Townships Association accept the statement of facts asserted by the Defendant-Appellee City of Detroit as complete and correct.

DESCRIPTION OF THE AMICI CURIAE

The Michigan Municipal League

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund, which was established in 1983, is to represent the member local governments in litigation of statewide significance. It provides support and assistance to cities and villages and their attorneys in court cases and other matters where the issues have a broad impact on both the municipality involved and on other municipalities in the State. This brief of Amici Curiae is authorized by the Legal Defense Fund's Board of Directors.

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a non-profit organization formed in 1953 to provide a unified voice for Michigan's township governments. MTA is proud to claim more than 99 percent of the 1,242 Michigan townships as members. The MTA staff and board of directors are committed to helping MTA's 6,500 member township officials govern their townships more efficiently and improve the services they provide to Michigan's four million-plus township residents. Influencing legislation,

policy and regulations by representing townships before the Legislature, the executive office and state agencies are at the heart of MTA's mission. MTA initiates and monitors legislation that is in the best interest of townships and follows it through the legislative process.

STANDARD OF REVIEW

This Court is with an appeal of an order granting summary disposition, which is reviewed *de novo*. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). This case involves matters of constitutional principles, which are reviewed *de novo*. *Mayor of Lansing v Public Service Comm'n*, 470 Mich 154, 157; 680 NW2d 840 (2004).

INTRODUCTION

The case before this Court bears great significance for municipalities across the state, particularly the cities, villages and townships represented by the amici curiae. This Court is faced with determining whether the solid waste inspection fee charged by the City of Detroit (the "City") to commercial and industrial properties not using the City's refuse collection services constitutes a valid fee or a disguised tax. The analysis is governed by this Court's determination in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), which effectively broadened the application of the so-called "Headlee Amendment" of the Michigan Constitution to municipal activities financed by user fees. Article 9, §31 of Michigan's Constitution, the portion of the Headlee Amendment at issue in *Bolt* and in the case at bar, prohibits the levy of a new tax or an increase in an existing tax without a vote. In pertinent part, section 31 states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified . . . without the approval of a majority of the

> qualified electors of that unit of Local Government voting thereon.

Mich Const 1963 Article 9 § 31. *Bolt* did not invent a new standard for measuring whether a charge for a municipal service constitutes a valid user fee or an unconstitutional tax, but it did integrate existing standards to create a three-prong test that has cast a great deal of uncertainty over municipalities seeking to establish user fee systems for a variety of costly yet critical functions.

User charges for municipal services are a critical component of municipal financial management. They diversify revenue sources, align revenues with expenditures and in certain instances are more equitable than taxes because they match payment for a service with consumption of that service. The *Bolt* standard ostensibly supports these principles of public policy and management; however, if applied in its most extreme and expansive form, *Bolt* threatens to invalidate legitimate and reasonable user fee systems. The Plaintiff-Appellant in the case at bar seeks to use *Bolt* for the very purpose, and it is the responsibility of this Court to ensure that the proper boundaries are erected around the *Bolt* analysis, preventing its abusive application

It is the intention of the amici curiae to confine its analysis to issues raised and addressed by the parties. Their purpose as "friends of the court," however is to attempt to provide special perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v Commodity Futures Trading Com'n*, 125 F3d 1062, 1063 (CA 7 1997).

ARGUMENT

I THE *BOLT* TEST CONSIDERS ALL THREE PRONGS IN THEIR TOTALITY

Bolt and its progeny recognize that the three-part test for determining whether a charge is a valid user fee or a tax in violation of the Headlee Amendment is designed to look at all three factors together. That is, failure to satisfy one prong of the three-part test does not compel a finding that a charge constitutes a tax. Rather, clear and strong satisfaction of one or two *Bolt* factors may provide sufficient counterweight to a failure to satisfy one or two factors, such that a fee remains valid. *See, e.g., USA Cash #1, Inc. v City of Saginaw*, 285 Mich App 262; 776 NW2d 346 (2009).

In *Wheeler v Charter Township of Shelby*, 265 Mich App 657; 697 NW2d 180 (2005), the Court of Appeals considered a challenge to a township ordinance requiring single-family residences to use a single, township-approved waste hauler for the disposal of household waste and to pay a fee for such service. The defendant township had entered into a contract under which the waste hauler would bill each residential property generated directly and apply revenues generated by the fee to offset the costs of collection and disposal. *Id.* at 661. The *Wheeler* court found that the waste collection fee served a regulatory purpose, observing that waste management represents a valid exercise of police power and the fees paid to the hauler were intended to support the proper exercise of that power. *Id.* at 665. The court also determined the waste collection and disposal charge satisfied the proportionality requirement of *Bolt*. According to

documentation presented at trial, all revenues generated by the fee covered the costs of collection and disposal. *Id.* The waste collection and disposal fee in *Wheeler* was mandated, not voluntary, and failure to pay constituted a misdemeanor punishable by a $500 fine and possible jail time. *Id.* at 666. However, a court considers the three *Bolt* factors "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Id.* at 665 (quoting *Graham v Kochville Twp.*, 236 Mich App 141, 151; 599 NW2d 793 (1999)). Therefore, on the strength of the fee's regulatory purpose and its direct proportionality to actual costs, the court in *Wheeler* held that the waste collection and disposal fee constituted a true user fee rather than a disguised tax. *Id.* at 664. Thus, although amici curiae believe strongly and submit to this Court that the City's solid waste inspection fee satisfies all three prongs of the *Bolt* test, it also notes that satisfaction of all three factors goes beyond what is required to pass muster under *Bolt*.

II THE COURT OF APPEALS CORRECTLY HELD THAT THE INSPECTION FEE SERVED A REGULATORY PURPOSE

A. The City's regulation of solid waste represents a clear and well-recognized regulatory purpose intended to protect the health, safety and welfare of citizens of the City.

The first prong of the *Bolt* test requires that a valid user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Bolt*, 459 Mich at 161; *see also Merrelli v St. Clair Shores*, 355 Mich 575, 583-84, 96 NW2d 144 (1959), *Vernor v Secretary of State*, 179 Mich 157; 167-70; 146 NW 338 (1914). In the case at bar, the

regulatory purpose is clear. As stated in the Detroit City Code, the inspection fee was part of a larger regulatory regime intended to ensure

> a sanitary and satisfactory method of storage, preparation, collection, transport, disposal and placement of municipal solid waste and for the maintenance of public and private property in a clean, orderly, and sanitary condition to ensure the peace, health, safety and welfare of the People of the City of Detroit

Detroit City Code § 22-2-1. Thus the solid waste program contained two distinct components. First, with respect to properties whose owners opted into the collection service offered by the City's Department of Public Works, the solid waste program included collection, transport and disposal activities. The solid waste program's second component was verification of compliance with the requirement that all properties within the City receive solid waste service. For properties using the City's service, the cost of verification was included in their service contract; for those opting out of the City's service, separate inspection activities were required. The actual inspections were carried out by the Department of Environmental Affairs, although ultimately the responsibility for maintaining compliance records rested with the Department of Public Works. Thus, while aspects of the solid waste program were carried out by two different departments, all activities related to the program were connected to a single regulatory purpose that can be clearly articulated: the regulation of solid waste in the City of Detroit for the purpose of protecting the health, safety and welfare of its citizens.

B. The revenue requirements of a regulatory program must be measured program-wide.

In finding that the City's solid waste inspection fee serves a regulatory purpose, The Court of Appeals concludes that "[t]he fact that the inspections that the Department of Environmental Affairs performs generates revenues for the Department of Public Works does not establish, as a matter of law, an intent by the city to raise revenue under the guise of implementing a police power regulation." *Wolf v City of Detroit* 287 Mich App 184, 206; 786 NW2d 620 (2010). In its brief, the Plaintiff-Appellant contends that this statement is inconsistent with *Bolt*. It quotes the Headlee Blue Ribbon Commission's statement that "[a] 'fee for service' or 'user fee' is a payment made from the voluntary receipt of a measured service, **in which the revenue from the fees are used only for the service provided**." Plaintiff-Appellant's Brief at p 28, citing Headlee Blue Ribbon Commission Report, Section 5, p 30 (emphasis supplied by Plaintiff-Appellant) (quoted in *Bolt*, 459 Mich at 168). The Plaintiff-Appellant posits that the inspection fee subsidizes collection activities and therefore inspection fees generate excess revenues. This ignores the fact that both the inspection and collection activities are part of the City's broader solid waste regulatory program, notwithstanding the fact that the activities are split between two different City departments. In *County of Saginaw v John Sexton Corporation of Michigan*, 232 Mich App 202; 591 NW2d 52 (1999), the Court of Appeals found that the revenues generated by a solid waste disposal charge were appropriately sized to support a regulatory function, notwithstanding that the fees covered more than the county health department's budgetary figures. The court stated

> According to the county's solid waste management director . . . operational costs included county solid waste employee salaries, benefits, and travel expenses, promotion of the county's recycling program, and ordinance enforcement and implementation activities such as monitoring who utilizes each landfill, recording the landfill activity of each hauler, ensuring that no improper waste enters the landfills, and aerial capacity estimates of landfill space. Thus, the revenues derived from the surcharge fall below these costs of implementing the county's solid waste disposal plan.
>
> Defendants insist that the revenues derived from the landfill surcharge should not be measured against the costs of implementing the county's solid waste disposal plan in its entirety, but against only the health department's budgetary figures. The health department, whose responsibility it is to conduct landfill inspections and to enforce landfill ordinances and statutes, estimated its share of budgetary expenses to amount to less than [the revenues derived from the fee]. Defendants thus reason that because the landfill surcharge revenues greatly exceed actual landfill inspection and enforcement costs, the surcharge represents a general revenue-raising tax. We disagree.

Id. at 211-12. The *John Sexton* court found that the cost of a comprehensive regulatory program should be determined program-wide. The case at bar implicates this very same analysis, and the *John Sexton* court's analysis supports the Court of Appeals' finding on this issue in this case.

C. The *Bolt* 'regulatory purpose' prong does not flatly prohibit a user fee from generating revenue.

Even assuming *arguendo* the "subsidy" to the Department of Public Works represented excess revenue, the *Bolt* Court itself acknowledges that not every penny of a fee must be applied to offset the direct cost of service provided. Although the Commission's statement quoted above was incorporated by the *Bolt* Court, the Commission report does not have the force of law, and the statement identified by the Plaintiff-Appellant was quoted by the *Bolt* Court in its discussion of the "voluntariness"

prong of its analysis, not the "regulatory purpose" prong. Thus the language emphasized by the Plaintiff-Appellant miscasts the purpose of the *Bolt* Court's use of that statement. In the case of utility systems, the *Bolt* Court noted that "some capital component" may be included in a valid user fee. *Bolt*, 459 Mich at 163. The Court of Appeals subsequently stated more pointedly, "[w]hile a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham*, 236 Mich App at 151 (citing *Merrelli*, 355 Mich at 583; *Vernor*, 179 Mich at 167). Thus, the Plaintiff-Appellant's statement that "is no 'underlying regulatory purpose' exception" (Plaintiff-Appellant's Brief at p29) distorts the "regulatory purpose" prong of the *Bolt* test. An exception to what? The connection between a fee and a regulatory purpose is not an *exception* to some other requirement—it is the core concept of one prong of the *Bolt* test.

The Plaintiff-Appellant's statement might be corrected as follows: *There is no "strict revenue neutrality" exception to the conclusion that a program implemented primarily for regulatory purpose satisfies one aspect of the* Bolt *test.* Contrary to the Plaintiff-Appellant's characterization, the Court of Appeals in *Westlake Transportation, Inc. v Public Service Comm'n*, 255 Mich App 589; 662 NW2d 784 (2003), maintained fidelity to *Bolt* and its predecessors, *Merrelli* and *Vernor*, stating that "a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided

that it is in support of the underlying regulatory purpose, . . ." *Id.* at 613 (citing *Graham*, 236 Mich App at 151).

D. The budget relief resulting from the fee relates to the fee's offsetting the cost of the solid waste regulatory regime.

The Plaintiff-Appellant argues that the fact the inspection fee replaced the previously levied refuse collection tax and reduced the City's overall budget deficit supports the Plaintiff-Appellant's contention that the inspection fee was imposed for a revenue-raising purpose. This ignores the reality of the City's basic budget structure and disregards the nature of the previously levied tax.

Indeed the inspection fees would lower the City's overall deficit; however it does so because the Department of Public Works is in part a general-fund supported department of the City, and thus any relief to the Department of Public Works budget will free up general fund appropriations for other purposes. *Bolt* cases often involve challenges to proposed user fees for enterprise systems or municipal utilities—revenue systems that are designed to be self-sustaining and are therefore detached from the general fund of the municipal owner/operator. *See, e.g.*, *Mapleview Estates v City of Brown* City, 258 Mich App 412; 671 NW2d 572 (2003); *Graham*, 236 Mich App 141. In such cases, a court examining the "regulatory/revenue raising purpose" prong of a *Bolt* will view a spillover of revenues from the separate enterprise system into the general fund of the municipality as a strong signal that a user fee has potentially problematic revenue raising component. However, in the case of a department that falls within the

general fund accounting component of a municipality, general fund relief is an unreliable marker for this analysis. The general fund relief in this case results from a fee that was imposed and applied to cover the costs of a targeted, specific regulatory regime, and nothing more. The fact that the City's ability to cover that cost freed up fungible general funds for other purposes does not equate to a revenue raising purpose under *Bolt*.

Moreover, the fact that the inspection fee replaces a tax does not implicate a revenue raising purpose, because the replaced tax was of narrow application—this is not a case in which the City simply relieved its general burden of taxation in favor of a fee. The replaced tax had been levied under 1917 PA 298, as amended, which provides

> The city council of a city . . . may establish and maintain garbage systems or plants for the collection and disposal of garbage in the city or village, and may levy a tax not to exceed 3 mills on the taxable value of all taxable property in the city or village according to the valuation of the property, as made for the purpose of state and county taxation by the last assessment in the city or village for these purposes. The annual garbage tax shall be in addition to the amount authorized to be levied for general purposes by the general law or special charter under which the city or village is incorporated.
>
> (2) As used in this act, "garbage" means any putrescible and nonputrescible solid wastes, except body wastes, and includes ashes, incinerator ash, incinerator residue, street cleanings, solid market wastes, solid industrial wastes, and also rubbish including such items as paper, cardboard, tin cans, yard clippings, wood, glass, bedding, crockery, and litter of any kind.

MCL 123.261. The Attorney General has opined the "the clause 'for these purposes' confines the use of such tax revenues to the purposes expressed in the act, and they many not be diverted to other municipal uses or purposes." OAG, 1976, No 5075, p 617 (September 17, 1976), citing *Freeland v City of Sturgis*, 248 Mich 190; 226 NW 897

(1929); *Menendez v City of Detroit*, 337 Mich 476; 60 NW2d 319 (1953). The Attorney General further found that "the millage limitation for the special purposes contained in [1917 PA 298, as amended] is distinguishable from millage limitations for general purposes contained in general laws and charters under which municipalities are incorporated." *Id.* Thus, the Plaintiff-Appellant's reliance on the shift from a prior tax to a fee as an indicator of a revenue raising purpose is misplaced because the refuse collection tax previously collected under 1917 PA 298, as amended, was applied for a restricted purpose, in the same way a valid fee would be (and in this case, is) applied. In fact, the shift from a citywide tax to a set of fees for both collection and inspection is more equitable because it allocates cost to consumption. If the Headlee Amendment was enacted to ensure equity and fairness, it would be unfortunate to apply *Bolt* to defeat a policy decision designed to support those very principles.

III THE COURT OF APPEALS CORRECTLY HELD THAT THE INSPECTION FEE WAS PROPORTIONATE TO THE COST OF PROVIDING THE SERVICE TO WHICH IT RELATES

A. A proper *Bolt* analysis must maintain a proper division between the "revenue-raising/regulator purpose" prong and the "proportionality" prong.

The second prong of the *Bolt* test requires that a valid user fee it must "reflect[] the actual costs of use, metered with relative precision in accordance with available technology." *Bolt*, 459 Mich at 164. As an initial matter, it is important to maintain the proper division between the "revenue raising/regulatory purpose" prong and the

"proportionality" prong, as it is easy for an analysis of the revenue generated by a fee (the first prong) to drift into an analysis of the sizing of the fee (the second prong)—an error committed in the Plaintiff-Appellant's argument. The Plaintiff-Appellant states that "fees collected from commercial property owners who do not use the City to pick up their trash necessarily are used by the City to subsidize the costs of picking up trash from commercial properties who do use the City to pick up their trash." Plaintiff-Appellant's Brief at p 28. The Plaintiff-Appellant argues that this renders the inspection fee non-*Bolt* compliant on the basis of revenue generation and failure of a regulatory purpose. This argument is not only incorrect (as discussed *infra* at Section III.B), but it is also directed at the wrong prong of the *Bolt* test. The Plaintiff-Appellant links its argument to the statement in *Bolt* that a "proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society." *Id.*, quoting *Bolt*, 459 Mich at 164. That statement from the *Bolt* Court was directed at proportionality, and to associate it with the "revenue-raising/regulatory purpose" prong confuses the analysis. The proper analysis is as follows: The "revenue raising/regulatory purpose" prong relates to the revenue raised and its use, measured across a program (here the City's solid waste program) to determine the purpose of that program. The "proportionality" prong measures the relationship between the fees charged to an individual user and the cost of delivering service to that user. *See, e.g.*, *Graham*, 236 Mich App at 154; *Bray v. Dep't of State*, 418 Mich 149, 160, 341 NW2d 92 (1983).

B. The inspection service does confer a benefit upon property owners who do not receive City collection service, and a finding otherwise could threaten the fundamental principles of municipal user fee systems

Substantively, the Plaintiff-Appellant falls short in its argument that the City's inspection fee fails *Bolt* scrutiny because the fee is imposed on properties that *are not* receiving collection service from the City. Indeed, the inspection does confer a benefit: it ensures that property owners are not subject to fines and other consequences for non-compliance with public health requirements. At some level, one might argue that the ultimate benefit of the collection and inspection regime is public health, which is generalized and not directed solely to the property owners affected. If that was the case, though, any regulatory regime with a public health component and funded through user fees would be suspect. For example, a sewage disposal charge would have a fundamental problem because, while the producer of sewage is charged for the treatment of the sewage it produces, the result of sewage treatment is protection of public health. In fact, if a valid regulatory regime relates to the public health, safety and welfare, one can envision how the requirement of a regulatory purpose begins to come in conflict with the proportionality requirement, as the public cannot be charged for the peripheral benefits it may receive from municipal functions that are finance out of user charges.

A journey down this path could lead to the conclusion that virtually all user fees are suspect, and that is not only an infirm conclusion as a matter of law, but would threaten to disrupt a major component of municipal finance and government, and could call into question municipal enterprise systems financed under a variety of statutory

sources, and particularly the Revenue Bond Act, 1933 PA 94, which allows municipalities to charge user fees for a variety of services. MCL 141.101 *et seq.*

IV THE COURT OF APPEALS CORRECTLY HELD THAT THE INSPECTION FEE WAS VOLUNTARY

The final prong of the *Bolt* analysis is "voluntariness"—the notion that a valid user fee must relate to a voluntary service. *Bolt*, 459 Mich at 162; *see also Ripperger v City of Grand Rapids*, 338 Mich 682; 62 NW2d 585 (1954). Indeed the Court of Appeals correctly found that the inspection fee was voluntary. The fact that a property owner must comply with the public health regulations does not lead to the conclusion that the property owner should not be charged for voluntarily submitting to a separate inspection regime by opting out of City-provided service. At the core of the "voluntariness" prong of the *Bolt* test lies the simple notion that the user of a service has some choice as to whether or not to use that service. *See, e.g., Kowalski v. City of Livonia*, 267 Mich App 517, 520; 705 NW2d 161 (2005). A property owner's decision to opt out of City refuse collection service is also a decision to opt in to the separate inspection regime, which generates the charge. The Plaintiff-Appellant notes that the Court of Appeals reached its conclusion on voluntariness "[w]ith little explanation." Plaintiff-Appellant's Brief at p 43. Amici curiae submit that the Court of Appeals' brevity on this issue results from the simplicity of the facts: A property owner has two alternatives, opt into City collection or opt into City inspection. While the presence of only two alternatives seems to suggest to

the Plaintiff-Appellant that property owners are faced with a false choice, that notion is not supported by law.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing arguments and authorities, the amici curiae respectfully request that this Court affirm the Court of Appeals' decision.

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